Office-Supreme Court, U.S.
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SEP 28 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-304

In The

Supreme Court of the United States

October Term, 1984

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JAMES I. GRANN, JOHNNY E. WINSTON, GERALD R. WHITFIELD, JON F. SIPPL, FRANCIS L. RETELLE, STEVEN R. REINSTRA, RICHARD J. MILLER, ROBERT M. LOMBARDO, STEVEN A. KOECKE, RUDOLPH J. JERGOVIC, BERNARD D. HEBARD, WILLIAM S. GILFOY, DENNIS A. GERFEN, LEMUEL B. FRASER, ROBERT J. FAUST, and KENNETH D. COUTURE,

Plaintiffs-Petitioners,

v.

CITY OF MADISON, a municipal corporation,

Defendant-Respondent.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

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September 28, 1984

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THE RESPONDENT'S ACTIONS ADVERSELY AFFECTED THE PLAINTIFFS

The defendant/respondent claims its actions did not adversely affect the plaintiffs. Respondent's Brief at P. 8. This purely factual argument is inappropriate in the brief in opposition to the plaintiffs' Petition for Writ of Certiorari.

Further, the claim is specious in light of the fact that the parties stipulated in the District Court to the defendant's prima facie violation of 28 U.S.C. Sec. 206(d)(1). Petitioners' App. at 26. Accordingly, the Court of Appeals' Decision is devoid of any discussion regarding whether or not the plaintiffs were the victims of discrimination. Petitioners' App. at P. 1-24. The fact that discrimination occurred against the plaintiffs has been a "given" in this case from its inception.

When the females were promoted, they were promoted to a pay range two grades higher than the males. Petitioners' App. at P. 47. Their promotions were based solely on sex. *Id.* The promotion of the females increased their classification seniority, which gave them a preferential choice of vacation time, work schedule, and job assignment. Petitioners' App. at 49. Finally, since the rank of detective supervisor was to be limited to 24 individuals, the promotion of five females into that rank prohibited five of the plaintiffs from competing for the limited number of jobs within that pay range. Petitioners' App. at 49.

The extent to which the plaintiffs were affected is not probative. As this court recently stated:

> Undoubtedly, not much money and seniority are involved, but the amount of money and seniority at stake does not determine mootness. As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot, notwithstanding the size of the dispute. *Powell v. McCormack*, 395 U.S. 486, 496-498, (1969). Moreover, a months pay is not a negligible item for those affected by the injunction, and the loss of a months competitive seniority may later determine who gets a promotion, who is entitled to bid for transfers, or who is first laid off if there is a reduction in force. *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S.Ct. 2576, 81 L.Ed2d 483, (1984).

Accordingly, the defendant's argument that the plaintiffs were not affected by its decision to promote five females to the rank of detective supervisor, is without merit.

THE ISSUE DECIDED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS CLEAR AND NOT LIMITED TO THE FACTS BEFORE IT

The defendant contends that the petitioners misstate the issue determined by the Seventh Circuit Court of Appeals. In order to respond to the defendant's argument in this regard, it is necessary only to review the written decision rendered by the Seventh Circuit. In the first sentence of that decision, the Court of Appeals characterized the issue before it as follows:

> A combination of facts, apparently unique, presents us with a case of first impression regarding the relationship between the federal enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-2000e-17, and state enforcement of state fair unemployment laws. Petitioners' App. at P. 2.

Later on in its decision, the Seventh Circuit narrowed the precise issue before it as follows:

> The final issue we must confront is also the most difficult, did the District Court err in holding that reliance on a state agency's order cannot be a defense to a Title VII claim? Petitioners' App. at P. 10.

After defining the general and specific issues before it, the Seventh Circuit concluded that:

> . . . reliance on a state agency's order enforcing the right of a protected group to be free from discrimination in employment is an absolute bar to a suit by fellow employees, claiming that the action required by the remedial order constitutes a violation of Title VII. Petitioners' App. at P. 17.

The Decision was not based upon the facts determined by the District Court. Rather, the Seventh Circuit's holding was based entirely upon its understanding of the relationship between Title VII and state enforcement of state fair employment laws. Petitioners' App. at P. 2.

Accordingly, the precedent established by the Seventh Circuit's decision violates the due process rights of all employees adversely affected by state administrative agency orders.

The defendant correctly states that at no time prior to their petition to this court did the plaintiffs assert that the state agency's remedial order in this case affected their constitutional rights. Respondent's Brief at P. 11. However, prior to the decision rendered by the Seventh Circuit, not even the defendant had the temerity to argue that the

agency's order granting the females a promotion was not reviewable in the Federal Courts. As the defendant embarrassingly admits in its brief, the plaintiffs:

> . . . were not obliged to pursue in state court the state's unfavorable administrative action on their claim. *Kremer, supra,* at 102 S.Ct. 1891. Nothing in the Court of Appeals' Decision indicates its disagreement on that point. Respondent's Brief at P. 14.

The plaintiffs agree with the defendant, that prior to the Seventh Circuit's Decision in the case at bar, there was no rule of law that mandated the plaintiffs seek state court review of the unfavorable administrative order. Unfortunately, the United States Circuit Court for the Seventh Circuit clearly held that the failure to obtain such a review created an absolute bar to the plaintiffs' Federal Court action.

The language used by the Seventh Circuit in that regard is unambiguous:

> . . . the only rationale resolution of the issue posed by the plaintiffs is to hold that reliance on a state agency's order enforcing the right of a protected group to be free from discrimination in employment *is an absolute bar to a suit by fellow employees claiming that the action required by the remedial order constitutes a violation of Title VII.* Petitioners' App. at P. 17 (emphasis added).

Nor is the effect of that language softened by the defendant's argument that the plaintiffs could have been parties to the females' state court action.

At the beginning of its responsive brief, the defendant claimed that the plaintiffs could not "accurately be characterized as employees adversely affected" by the state administrative order. Respondent's Brief at P. 6, 8.

Later on, in response to the plaintiffs' claim that forcing them to become parties to the female's state court claims violated the plaintiffs' constitutional rights, the defendant asserted that the plaintiffs could have been parties to the females' state administrative action, under Wisconsin's "liberal definition of the term party as it is used in Chapter 227." Respondent's Brief at P. 12.

The definition of party is set forth in Chapter 227.01, Wis. Stats., (1981-1982). As noted by the defendant, a party is defined as "any person whose substantial interests may be adversely affected." Respondent's Brief at P. 12. Apparently, the respondent is only willing to admit that the plaintiffs' "substantial interests" were adversely affected by the state administrative ruling when this supports the defendant's argument concerning the constitutional "guarantees," established in Chapter 227 of the Wisconsin Statutes. The Court will recall that the Respondent took the opposite position when addressing the issue of discrimination.

THE DEFENDANT HAS PROVIDED NO JUSTIFICATION FOR PROMOTING FIVE FEMALES TO THE RANK OF DETECTIVE SUPERVISOR WHEN THE ADMINISTRATIVE AGENCY ORDER MANDATED THAT ONLY TWO BE PROMOTED

At Page 17 of its brief, the defendant correctly identified one of the plaintiffs' claims against it. That claim is that ". . . Madison not only promoted the two complainants as ordered by the agency, but also voluntarily promoted the remaining three female Detective II's who had not filed any complaint." Respondent's Brief at P. 17. The three females who were not parties to the state agency proceedings, but were nevertheless promoted by the City

were neither members of a class nor individual plaintiffs. Accordingly, it is difficult to conceptualize any legal basis for their promotion.

The United States Court of Appeals for the Seventh Circuit ignored this issue, in light of its holding that state agency remedial orders constitute "an absolute bar to a suit by fellow employees, claiming that the action required by the remedial order violates their Title VII rights." Petitioners App. at P. 17. In other words, since the remedial order was an absolute bar, the plaintiffs in this case had no right to question whether or not the city's actions were in compliance with it.

The defendant arrogantly claims that it "voluntarily promoted the other three detective II's, whose situation was the same as the two ordered promoted by the state administrative agency." Respondent's Brief at P. 21. There is not a shread of evidence in the record to support this claim, nor can it be the plaintiff's burden to prove that the promotion of the three additional female detectives was improper.

Once the defendant conceded the plaintiffs' prima facie case, it became the defendant's burden to present evidence that the three females who were not parties to the initial state agency action would have been considered for promotion "but for" prior discrimination. Petitioner's App. at P. 26.

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CONCLUSION

The Seventh Circuit unambiguously held as follows:

> . . . Reliance on a state agency's order enforcing the right of a protected group to be free from discrimination in employment *is an absolute bar to a suit by fellow employees claiming that the action required by the remedial order constitutes a violation of Title VII.* Petitioners' App. at P.17 (emphasis added).

Accordingly, the only remedy available to an employee adversely affected by a state agency order is to intervene in the state agency proceeding as outlined in the Seventh Circuit's opinion. Petitioners' App. at P. 23. The constitutional deficiencies in requiring intervention are manifest.

In addition, the Seventh Circuit's Decision accords state agency orders res judicata effect against non parties. This is in clear violation of this court's recent holding in *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 102 S.Ct. 1883, 1891, 72 L.Ed 2d 262, (1982).

Finally, the Seventh Circuit's Decision cannot stand in light of this court's clear statement in Kremer that:

> A state agency determination does not preclude a trial de novo in Federal Court (citation omitted). Congress made it clear beyond doubt that state agency findings would not prevent a Title VII complainant from filing suit in Federal Court. *Kremer* at 102 S.Ct. 1883, 1900.

Respectfully submitted this 28 day of September, 1984.

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September 28, 1984